

1 The opinion in support of the decision being entered today is *not* binding
2 precedent of the Board

3
4 UNITED STATES PATENT AND TRADEMARK OFFICE

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6
7 BEFORE THE BOARD OF PATENT APPEALS
8 AND INTERFERENCES
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11 *Ex parte* GARY LEE KNIRK, PAUL JEFFREY TAUZER, and
12 LARRY B. HIGGINS
13

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15 Appeal 2006-3004
16 Application 10/796,708
17 Technology Center 3700
18

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20 Decided: July 26, 2007
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23 *Before:* MURRIEL E. CRAWFORD, JENNIFER D. BAHR and ROBERT
24 E. NAPPI, *Administrative Patent Judges.*

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26 CRAWFORD, *Administrative Patent Judge.*
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29 DECISION ON APPEAL
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31 STATEMENT OF CASE

32 Appellants appeal under 35 U.S.C. § 134 (2002) from a final rejection
33 of claims 1, 4 and 5. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

34 Appellants invented a bathroom support bar (Specification 1).

35 Claim 1 under appeal reads as follows:

36 1. Bathroom support bar comprising:

1 a bar having a central portion extending along a first direction
2 between a pair of ends, said ends being bent away from said bar central
3 portion; and
4 said bar being formed of a hollow thin walled tube material, with said
5 ends being formed integrally with said central portion, and a mounting
6 flange formed integrally at each said end and including a plurality of tabs
7 extending radially outwardly from said thin wall at each said end, with there
8 being at least three of said tabs in each mounting flange, and said at least
9 three of said tabs including a hole to receive a threaded fastener, and a
10 separate cover disposed at each said end to cover said holes.

11
12 The Examiner rejected claims 1, 4 and 5 under 35 U.S.C. § 112, ¶ 2,
13 as being indefinite for failing to particularly point out and distinctly claim
14 the subject matter which applicant regards as the invention. The Examiner
15 states that the recitation “said holes” in claim 1 lacks antecedent basis and
16 that the recitation “said at least three said tabs each including holes” in claim
17 5 is unclear.

18 The Examiner rejected claims 1, 4 and 5 under 35 U.S.C. § 102(b) as
19 being unpatentable over Sarkisian in view of Guenther.¹

20 The prior art relied upon by the Examiner in rejecting the claims on
21 appeal is:

22 Sarkisian	872,689	Dec. 3, 1907
23 Guenther	6,038,714	Mar. 21, 2000
24		

¹ The Examiner has withdrawn the rejection of claims 1, 4 and 5 under 35 U.S.C. § 103 as being unpatentable over Guenther.

1 Appellants contend that the recitation in claim 1 of “said holes” and
2 the recitation in claim 5 of “said at least three said tabs each including holes”
3 are clear and are directed to a single hole in each of the three tabs.

4 Appellants also contend that the placement of a third tab on the
5 Sarkisian rod may cause a tab to extend into the window and that therefore a
6 person of ordinary skill in the art would not be motivated to modify the
7 Sarkisian device so as to have a third tab (Appeal Br. 5). Appellants also
8 contend that one of ordinary skill in the art would not have been motivated
9 to modify the Sarkisian rod so as to have a cover for the flange because in
10 Sarkisian a curtain covers the flange (*id.*) .

11 ISSUES

12 The first issue is whether Appellants have shown that the Examiner
13 erred in holding that the recitations in claim 1 of “said holes” and the
14 recitation in claim 5 of “said at least three said tabs each including holes” are
15 unclear.

16 The second issue is whether Appellants have shown that the Examiner
17 erred in holding that it would have been obvious to modify the Sarkisian rod
18 so as to include a flange with three tabs and a cover.

19 FINDINGS OF FACT

20
21 Appellants invented a bathroom support which includes a bar 22
22 having ends 23 and an integrally formed mounting flange (paragraphs 0011
23 to 0012; Figure 1A). The mounting flange includes three tabs 26 which
24 extend radially outwardly. Each tab 26 includes a hole 28 for receiving a
25 threaded fastener (Figure 1A; paragraph 0012).

Sarkisian discloses a bar b having a mounting flange formed integral with the ends of the bar (p. 1, l. 73). The mounting flange has tabs or feet b' (p. 1, ll 68 to 74). Each of the tabs or feet b' has a hole for receiving screws 2 (p. 1, ll 75 to 80).

Guenther discloses a bathroom support bar that includes flanges 14 and 16 with covers 18 and 20 (col. 2, lines 11 to 14). The cover is provided to conceal the flange (col. 1, lines 11 to 13).

DISCUSSION

Indefiniteness

We initially note that the second paragraph of 35 U.S.C. § 112 requires claims to set out and circumscribe a particular area with a reasonable degree of precision and particularity. *In re Johnson*, 558 F.2d 1008, 1015, 194 USPQ 187, 193 (CCPA 1977). In making this determination, the definiteness of the language employed in the claims must be analyzed, not in a vacuum, but always in light of the teachings of the prior art and of the particular application disclosure as it would be interpreted by one possessing the ordinary level of skill in the pertinent art. *Id.*

The examiner's focus during examination of claims for compliance with the requirement for definiteness of 35 U.S.C. § 112, second paragraph, is whether the claims meet the threshold requirements of clarity and precision, not whether more suitable language or modes of expression are available. Some latitude in the manner of expression and the aptness of terms is permitted even though the claim language is not as precise as the examiner might desire. If the scope of the invention sought to be patented

1 cannot be determined from the language of the claims with a reasonable
2 degree of certainty, a rejection of the claims under 35 U.S.C. § 112, second
3 paragraph, is appropriate. *Energizer v. ITC* 435 F.3d 1366, 1370, 77
4 USPQ2d 1625, 1628 (Fed. Cir. 2006).

5 Thus, the failure to provide explicit antecedent basis for terms does
6 not always render a claim indefinite. As stated above, if the scope of a claim
7 would be reasonably ascertainable by those skilled in the art, then the claim
8 is not indefinite. *See Ex parte Porter*, 25 USPQ2d 1144, 1146 (Bd. Pat.
9 App. & Inter. 1992).

10 With this as background, we analyze the specific rejections under
11 35 U.S.C. § 112, second paragraph, made by the examiner of the claims on
12 appeal.

13 Although the recitation in claim 1 of “said holes” lacks explicit
14 antecedent basis, when claim 1 is read in light of the specification it is clear
15 that claim 1 is reciting a hole in each of the tabs. In the same vein, when the
16 phrase “at least three of said tabs each including holes” is read in light of the
17 specification it is clear that it too recites a hole in each tab and that the use of
18 the word “holes” instead of “hole” is a typographical error. This is so
19 especially because the word “holes” is followed by the recitation “to receive
20 a threaded fastener” thereby clarifying that each of the tabs has just one hole
21 with one fastener within the hole. In view of the foregoing, we will not
22 sustain the Examiner’s rejection of claims 1, 4 and 5 under 35 U.S.C. § 112,
23 ¶ 2.

1
2 Obviousness

3 We do not agree with the Appellants that to provide a third tab on the
4 flange disclosed in Sarkisian would require structure that might extend
5 toward the window because the third tab could be placed perpendicular to
6 the disclosed tabs extending away from the window. We also do not agree
7 with the Appellants that there would be no motivation to cover the flanges
8 disclosed by Sarkisian with a cover because the flanges are covered by a
9 curtain. In our view, it is not clear that the flanges would be totally covered
10 by a curtain in the modified Sarkisian device. This is so firstly because a
11 third tab may be placed perpendicular to the other displayed tabs in a
12 position extending away from the window and not be covered by a curtain.
13 Secondly, a curtain placed on rod b may not cover the tab that extends
14 toward the ceiling.

15 In view of the foregoing, we conclude that the Appellants have not
16 shown that the Examiner erred in holding that claims 1, 4 and 5 are
17 unpatentable over Sarkisian in view of Guenther. Therefore, we will sustain
18 this rejection of the claims.

19 AFFIRMED

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21
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